No. 12,414

IN THE

United States Court of Appeals

For the Ninth Circuit

ANDREW FUGAZZI,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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I.

STATEMENT OF PLEADINGS AND OF FACT

The appellant's opening brief does not set forth any concise abstract or statement of the case, including the issues made by the pleadings. A proper presentation of issues on this appeal requires such a statement.

A. Statement of Pleadings.

The plaintiff and appellant sought by his complaint to recover for alleged injuries suffered in the scope and course of his employment as a carman, working on the defendant's

rip (repair) tracks in the City of Stockton, State of California. The action was commenced under and by virtue of the Federal Employers' Liability Act. The complaint charged that defendant owed plaintiff but one duty, that is, "the duty of exercising ordinary care to provide plaintiff with a reasonably safe place in which to perform his work or service." Only one act of negligence was alleged against defendant, that is, that defendant "negligently failed to provide plaintiff with a reasonably safe place in which to perform his work or services in this—that * * * the said defendant * * * negligently required plaintiff to perform the services as aforesaid at a time when there was a sufficient amount of ice alongside said running board so as to make the place wherein plaintiff was working unsafe."

The charge of negligence was denied and the answer set up two affirmative defenses. One was that plaintiff himself was guilty of negligence in respect to the matters alleged in said complaint and that his negligence was the sole proximate cause of his injury, if any. The second defense was that of contributory negligence; that if plaintiff's own negligence was not the sole proximate cause of his accident, then it directly contributed to his accident and injuries.

The case was tried solely upon such issues as made by the pleadings.

At the conclusion of its case, the defendant made its motion for a directed verdict (R 275). The court in denying said motion stated that "the denial is deemed under that rule (50(b)) to mean that the court will submit the action to the jury subject to a later determination of the legal questions raised on the motion." Thereafter, the jury returned

a verdict in favor of plaintiff and against defendant in the sum of $8,575.00 (R 16). Subsequently, and in the time allowed by law, the defendant filed a motion for judgment notwithstanding the verdict (R 17) and the trial court, Honorable Judge Dal M. Lemmon presiding, granted said motion. In so doing, the trial court rendered a memorandum of opinion (R 18) and also caused a formal judgment notwithstanding the verdict to be entered (R 21).

B. Statement of Facts.

Plaintiff, at the time of his injury, was an experienced car repairman and had worked for defendant in its Stockton yards continuously from June 28, 1944, to the date of his injury, the 8th day of February, 1950 (R 36). Defendant maintains in the City of Stockton a railroad yard for receiving and making up trains and for other railroad purposes, including the making of light repairs upon the rolling stock coming into the yard. In the City of Stockton, there is also maintained an interchange track where freight cars (enroute) are interchanged between various railroads operating in and about Stockton (R 192).

All freight trains coming into defendant's Stockton yards to be routed to or through are inspected for defects with specific reference to the cars' safety devices and appliances (R 136, 113). Upon the arrival of said trains, the cars are inspected for any defects by car inspectors who work in groups of two (R 105); and if defects are found, then such cars are tagged with a "Bad Order" card describing the defect (R 114). Cars in need of light repairs are then removed to the repair track (R 114). Heavy repairs are done elsewhere (R 194).

The car in question, to-wit, N.Y.C. 130765, was loaded with tin plate and originated in Rankin, Pennsylvania, and was routed Baltimore & Ohio Railroad, Missouri Pacific, Texas Pacific Railway, Southern Pacific Company via El Paso, Texas, to Stockton and then via Western Pacific from Stockton to its destination, San Jose (R 258). The car arrived in Stockton prior to 11:00 o'clock A.M. on the morning of February 7th (R 104) and was inspected by car inspectors Hensley and Trotter (R 105). They found that two of the nine to twelve boards (R 70) of the running board on top of the car were decayed or defective, and consequently, they placed upon the side of the car a "Bad Order" card showing defective running board (R 114).

A running board is a safety appliance under the Interstate Commerce Commission's regulations (R 137). A running board consists of a rough finished but painted board walk, three boards wide, down the middle of the top of a freight car (R 99). On this running board, each board was five and one-half to six inches wide. These boards were spaced about an inch and one-half apart (R 66) and so constituted a wooden walkway along the entire top of the car approximately two feet in width. Because of the defect in the running board (a safety appliance), the Interstate Commerce Commission regulations required defendant to effect repair before the car could be turned over to the Western Pacific Company at the interchange (R 137).

The car was then moved to the rip, or repair, track, where on the morning of February 8, 1950, at the commencement of the morning shift (7:00 o'clock A.M.), the carmen or car repairmen (who likewise work in teams of two, a carman and a helper) proceeded to make the repairs.

It is the practice in the Stockton yards that upon reporting to work, a car repairman and helper obtain their tools at the blacksmith's shop (R 193) and then go to the head end of the rip track. The first carman and helper arriving there would take the first car, and the next pair then would take the second car (R 92, 193). The carmen receive no instructions as to the type of repairs necessary, but ascertain that from the "Bad Order" card appearing on the side of the car (R 92, 193). The carman then inspects the car itself to determine the exact nature of the work to be done, and if he has sufficient knowledge and tools to repair the defect, he does so; otherwise, he consults his foreman and obtains instructions from him as to the proper method of repair (R 93, 193). On the morning in question, Mr. Fugazzi did not consult his foreman (R 61, 193).

Another custom existing in the yards was that each carman was delegated the duty to ascertain whether such repairs could be made with safety to himself. If in his opinion the work couldn't be done with safety, he was to advise the foreman and receive instructions as to how to proceed. If the work could be done with safety to himself, then the carman proceeded with the work (R 213).

On the morning in question, Fugazzi examined the "Bad Order" card on said car (N.Y.C. 130765). This card showed "B. O. R. Board" (meaning Bad Order Running Board), and showed that it was inspected by T. & H. (meaning Trotter and Hensley, two of the inspectors) on February 7, 1950 (R 43). Fugazzi then went up the ladder on the A end of the car (the opposite end from the B end, where the hand brake is situate (R 65)). At this time he had his hammer, but he had forgotten his chisel (R 44) and he went down to get it

(R 44). When he went up there the first time, he didn't see any ice upon the roof of the car. Then he procured his chisel and with hammer and chisel, he went again to the top of the car and walked down the running board until he got approximately to the middle (R 45). At that time, he saw ice on the middle part of the car, but no ice on the running board (R 45 and 77). Therefore, he saw the icy condition before he stepped off the running board (R 71). In the vicinity of the middle of the car he saw that one of the left boards of the running board was decayed and had to be replaced (R 84, 85).

Plaintiff testified that when he started to repair the decayed left hand board, he came to a crouch and had chisel in one hand and a hammer in the other. Then he got hold of the running board (apparently with the ends of his fingers since he was holding a chisel in one hand and a hammer in the other), and stepped back and off the board with both feet. A piece of the board he was to remove then gave way and his feet "gave at the same time" (R 71). In his direct examination, the plaintiff labeled the position holding onto the board he was to repair with his finger tips as being "a secure position" (R 46), but he did not explain how such position would remain secure if he was required to use one hand holding the chisel and the other hand hammering on the chisel in removing the board. Such an operation could not be done except by standing on the slippery metal roof without any hand hold or other security. In his deposition, the plaintiff did not mention holding onto the decayed board or the decayed board giving away but merely stated that he stepped off the running board to the metal roof with both feet and immediately slipped to the ground (R 82).

In his statement taken on February 9, 1950 (the day after the accident), plaintiff stated "* * * the only reason I got hurt was because I stepped off the wooden running board, yeah, I just forgot myself, don't ask me why because I knew the top was wet with dew. I just forgot, that's all! I could have stayed on the running board, certainly. Yeah, but the trouble is we all forget ourselves and make mistakes! Certainly, I should have stayed on the running board. * * * I slipped off the metal, yeah I wasn't on the running board. If I'd stayed on the running board I'd have been alright, because you don't slide on the running board." (Exhibit C.) This statement will be further discussed hereinafter.

It was admitted that the weather condition at Stockton on the morning of February 8th was foggy. The fog started to form at 2:29 A.M. (R 177). The temperature at 12:28 A.M. on February 8th was 43°, and gradually became cooler until 6:27 A.M., when it was 34°, and the thermometer read as follows:

At 7:28 A.M.—32°
At 8:28 A.M.—32°
At 9:30 A.M.—36° (R 173)

Sometime between 6:27 and 7:28 A.M., the temperature fell from 34° to 32° and continued at the latter temperature until sometime after 8:28 A.M. The evidence as to temperature at the time of the accident is therefore inconclusive. The accident occurred at 7:10 A.M., so freezing temperatures may or may not have existed at that time. In his statement of February 9th, the plaintiff said that the top of the car was white with dew, at the trial he testified that it was icy.

Relative to the thickness and the nature of the ice on the metal top of the car in question, plaintiff's witness Kokonas testified that the ice was "the thickness of a paper, or about a thirty-secondth of a inch" (R 94), and the defendant's witness Dulgar testified that "the running was not icy or slick, but the roof of the car at the side of the running board did have a very thin coating of ice on it"—"the thickness of a piece of paper" (R 191).

Plaintiff testified on cross-examination that the ice was an inch or an inch and a half thick (R 70). But he also testified "I am not sure of it; I am not sure it was that. I am just guessing" (R 72).

Since the roof of the car was peaked, and sloped from the center of the car each way to the eaves (R 116 to 118), and since the slope from the top of the center of the car to each eave was an 8-inch drop in 4.25 feet (R 118), no water would stand on the roof. The only water that could have accumulated on the roof would have been moisture from the fog that existed for some five hours prior to the accident (R 177). Therefore, the physical facts demonstrate that the only ice that could have been present was this frozen dampness or moisture, and it could only be of a paper thickness.

Plaintiff further testified that a piece of the decaying running board approximately one foot or more in length pulled off of the running board (R 76).

After the accident and as soon as plaintiff was removed in an ambulance (R 191), the foreman, Mr. Dulgar, inspected the top of the car and found that the running board was not icy or slick, but that there was a very thin coat of ice on the metal roof (R 191). Plaintiff's witness, Emanuel Kokonas, went on top of the car about an hour after the acci-

dent and found the conditions to be as stated by Mr. Dulgar. Kokonas further testified that it was not necessary to stand on the metal portion of the roof to make the repair in question, and he, in fact, repaired it without standing on the metal roof, but by standing on the two remaining boards (R 96). He also testified that he found two boards defective, one in the left strip at "B" end of the car, and the other at the right strip at the "A" end (R 95).

Witness Dulgar further testified that the repairs generally made to the roof or top of box cars were the repairs of the running board, the roof hand holds or the longitudinal running board, and all of these repairs can be made while the repairman is standing on the running board (R 195). In detail, he testified that if one of the boards on the left hand side of the running board was to be removed, the work could be done either by standing on the remaining boards of the running board or by straddling the two remaining boards of the running board. He has never seen any hazard resulting from this method of operation (R 195, 196). We have already referred to plaintiff's statement taken on the 9th day of February, 1950, wherein he admitted that he knew and was fully informed that this board should have been removed by standing or squatting on the remaining two boards.

The explanation of this accident is clearly given by the plaintiff himself in his statement when he said: "* * * this is the first time I've ever got hurt on any job in fact there's nothing to explain on this, the only reason I got hurt was because I stepped off the wooden running board, yeah I just forgot myself, don't ask me why because I knew the top was wet with dew. I just forgot, that's all! I could have

stayed on the running board, certainly. Yeah, but the trouble is we all forget ourselves and make mistakes! Certainly I should have stayed on the running board." (The full statement of Fugazzi (Exhibit "C") is attached to and made an appendix to this brief).

Additional facts will be referred to during the course of the subsequent argument.

II.

THE FEDERAL EMPLOYERS' LIABILITY ACT BASES LIABILITY OF EMPLOYER UPON NEGLIGENCE ONLY AND THE 1939 AMENDMENT TO SAID ACT DID NOT CHANGE THIS REQUIREMENT FOR MAKING A CASE OF LIABILITY.

The Federal Employers' Liability Act is well known to this court. Its amendment in 1939 and the misinterpretation of a few of the decisions of the Supreme Court of the United States have occasioned attempts by attorneys invoking it to urge that the established rules of negligence and proximate cause have been altered or abandoned. A short review of the act, of the amendment of 1939 and the recent decisions of the Supreme Court will demonstrate that this is not so.

The act of 1908, 45 U.S.C.A. (Section 51), so far as it concerns liability of the employer, by its first section gives a right of action to an employee of a common carrier by railroad where the employee was injured while he and the employer were engaged in interstate commerce, if the injury resulted "in whole or in part from the negligence of the officers, agents or employees of such carrier" or by reason of defects in its operating properties due to its negligence. The 1939 amendment added a new paragraph to the first section (Section 51) *but left the first paragraph exactly as it*

read in 1908. However, the amendment abolished the defense of assumption of risk.

This had real significance, as we shall show. The decisions under the first and unchanged paragraph of the first section of the act, from 1908 to the time of the amendment in 1939, had definitely established that to recover the employee must show that his injury was proximately caused by the negligence of his employer. Liability was based upon negligence only and the act excluded responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.[1]

We do not believe that it is necessary to consider all of these decisions of the Supreme Court, because in the concurring opinion of Justice Douglas in *Wilkerson v. McCarthy,* 336 U.S. 53, 93 L.ed. 497, commencing on page 70 (U.S. edition), all of the Federal Employers' Liability Act cases that reached the Supreme Court by petitions for certiorari are collected and listed. It is noted therein that of 55 petitions for certiorari filed during this period, twenty were granted. Of these, one was granted at the instance of the employer, and nineteen at the instance of the employee. In sixteen of these cases, the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In three of the cases, the lower court was sustained in taking the case from the jury. It is shown further that certiorari was denied in ten cases where the lower court withheld the case from the jury and rendered judgment for the employer.

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1. *Seaboard A. L. R. Co. v. Horton*, 233 U.S. 492, 501, 58 L.ed. 1062, 1068; *B. & O. C. v. Berry,* 286 U.S. 272, 276, 76 L.ed. 1098, 1102; *Missouri P. R. Co. v. Aeby,* 275 U.S. 426, 429, 72 L.ed. 351, 354, and many other cases.

In *Wilkerson v. McCarthy* (decided January 31, 1949), plaintiff was injured when he fell into a pit while crossing it on a narrow greasy board. Though disputed, the evidence would have sustained a finding that the board was habitually used as a walkway, and hence the Supreme Court properly held a verdict directed for the defendant to be erroneous. A review of the majority and all of the concurring opinions will show, however, that all of the members of the Supreme Court were in accord with the proposition that the 1939 Amendment did not change the basis of the employers' liability. In the majority opinion, Mr. Justice Black stated at page 61 (U.S.):

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. *That proposition is correct, since the Act imposes liability only for negligent injuries.* * * * There are some who think that recent decisions of this court which have required submission of negligence questions to the jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, *Griswold v. Gardner* (C.C.A. 7th Ill.) 155 F.2d 333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337, 338. This assumption * * * is inadmissible." (Emphasis supplied)

Mr. Justice Frankfurter, with whom Mr. Justice Burton joined, filed a concurring opinion in which he stated his view that certiorari should not be granted in a case of this type, but, it having been granted, he agreed with the result. In the course of his opinion (page 64-5 (U.S.)) he said:

> "It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based. * * * The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

In the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Murphy and Mr. Justice Rutledge joined, it is expressly recognized that "the act did not make the employer an insurer. The liability which is imposed was a liability for negligence. * * * The basis of liability under the Act is *and remains* negligence." (Page 70 (U.S.))

Since *Wilkerson v. McCarthy,* the Supreme Court has decided two cases under the Act, *Reynolds v. Atl. C. L. R. Co.,* 336 U.S. 207, 93 L.ed. 618 and *Moore v. C. & O. Ry. Co.,* 340 U.S. 573, 95 L.ed. 547. In both it held, as a matter of law, that plaintiff could not recover.

In the *Reynolds Case* a trainman was killed when he fell from a moving train. He was crossing from one car to another to give a signal. It was plain that the railroad negligently allowed canes to grow alongside the roadbed which required this action by the deceased, and also that he would not have been required to make this journey if the railroad had provided another brakeman. The Alabama Supreme Court conceded that negligence in the two respects charged appeared, but held that it did not appear that the accident resulted proximately, in whole or in part, from the negligence. The Supreme Court affirmed.

In the *Moore Case,* a trainman, who had been riding on the footboard of a locomotive, was run over by the locomotive. The claim was that he was thrown off by a sudden stop. The engineer testified that he saw the deceased fall and then brought the locomotive to a sudden stop. The Court, applying the rule of *Bunt v. Sierra Butte Gold N. Co.,* 138 U.S. 483, 485, 34 L.ed. 1031, 1032, held that if the engineer's testimony were disbelieved, such disbelief "would not supply a want of proof." In the course of its opinion the Court said:

> "To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. * * * We do not think that the isolated portion of the engineer's testimony relied on by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony totally at variance with such an inference. * * * To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof."

In an earlier decision subsequent to the 1939 amendment, *Brady v. Southern Ry. Co.,* 320 U.S. 476, 88 L.ed. 239, the Supreme Court stated with approval what had become the thoroughly established Federal rule under earlier cases in this regard:

> "The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case be properly left to the discretion of the

trier of fact—in this case, the jury * * * (Citing cases). When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. * * * (Citing such earlier cases) The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. * * * Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. *Tiller v. Atlantic Coastline R. Co.,* 318 U.S. 54, 67, 87 L.ed. 610, 617."

With this background of the development of the construction of said act, we wish to examine the specific grounds upon which the court below granted the motion for judgment notwithstanding verdict in the case at bar.

III.

THERE IS NO PROOF THAT THE METAL SLANTING ROOF OF THE BOX CAR WAS A PLACE OF WORK, OR THAT PLAINTIFF WAS REQUIRED TO WORK ON SAID METAL ROOF.

The complaint charges but one ground of negligence, that is, negligently failing to provide plaintiff with a reasonably safe place in which to perform his work in this, that said defendant *"negligently required* plaintiff to perform the services as aforesaid at a time when there was sufficient amount of ice along said running board so as to make the

place wherein the plaintiff was working unsafe." Under the pleadings, therefore, plaintiff had the burden of proving that the place from which he fell was a place of work.

This charge of negligence presupposes either that the plaintiff was required to work on that portion of the car which was made slippery by the ice, or that it was necessary to stand on that portion of the roof in order to repair the running board. Further, this charge presupposes that the hazard or unsafeness was caused solely by the presence of ice. Plaintiff concedes that there was no ice on the running board (R 45), and so long as he was on the running board, he was safe (Exhibit C).

The evidence relative to whether or not plaintiff was required to stand upon the slippery slanting roof of the car first appeared in plaintiff's case, when his witness Kokonas testified that it was not necessary for one to stand on the metal roof when repairing the running board, but such work could be done, and Kokonas did do such work, by remaining on the two boards while removing the defective left hand board (R 96). Defendant's witness Dulgar confirmed the testimony of Kokonas; he testified that all of the work could be performed by staying on the two remaining boards of the running board (R 195) and if under some circumstances such work could not be so done, then the workmen should straddle the two remaining boards. Further, he had seen no hazardous results from such practice (R 196).

Dulgar also testified that it was not the practice for a carman, when repairing a running board, to stand on the metal part of the roof (R 208) and that he has never seen anybody standing on the roof to repair one of these running

boards when an icy condition exists (R 209). Further, that it was the practice to repair defective running boards during such weather conditions and that a "qualified mechanic would protect himself against the ice" (R 208).

Hence, the evidence stands undisputed that the left hand board could be removed and repaired by standing, squatting or sitting on the remaining two boards of the running board, and the car in question was in fact repaired in that manner by Kokonas. Plaintiff in his case adduced no evidence whatsoever from which it could be inferred that he was required to work on the icy metal roof. Such an inference was expressly negatived by the following cross-examination of Dulgar:

> "Q. (By Mr. Fried): And you consider it a safe practice for a man to work on the roof of a car with ice on it?
>
> A. No man is required to work on a roof with ice on it." (R 207)

As shown by plaintiff's statement of February 9th, he also knew that it was not necessary to work on the metal roof with ice on it, and that the running board could be repaired while remaining on the two other boards thereof (Exhibit C). This statement was taken by Bernard G. Aguer, a claims agent for the Southern Pacific Company working on the hospital detail. Aguer testified that he calls at the Southern Pacific Company General Hospital daily, and upon his arrival, he has no knowledge that any accident has occurred or that any particular employee has been injured. He calls at the hospital office every morning and examines the admittance slips and checks them. As to those that "come as reportable I.O.D. cases, injury on duty cases,

I check their names for number of ward and number of bed and I proceed to call on those men" (R 234). He first ascertains from the attending nurse whether the patient is in a condition to be seen, and which he did before seeing the plaintiff on the morning of the 9th (R 235). He entered the ward. Plaintiff was confined to bed. He introduced himself and gave plaintiff his card and told him who he was and what he was there for. He explained the fact that he was interested in finding out just how he got hurt (R 237). The plaintiff told him that he was willing to give a statement. Aguer took the statement as the man gave it to him and wrote it to the best of his ability in the man's own style of speech. When he finished, he asked plaintiff to read it (R 238). Then he asked Fugazzi if the statement was satisfactory, if it represented what he told Aguer, and plaintiff stated that it did. Then plaintiff was asked if he had any objection to signing it. Plaintiff then proceeded to sign each page thereof before Mr. Aguer, who acted as a witness (R 238 and 239). This occurred between 12:30 and 1.30 on the afternoon of February 9th (R 235).

Plaintiff admits that said statement contained his signature on each page, but he does not remember signing it (R 86).

If appellant believed that any of the contents of the statement were incorrect or untrue, he would have testified to that effect. The appellant had ample opportunity to deny the contents or any part thereof. He was called as a rebuttal witness immediately following the completion of examination of witness Aguer, but he was not interrogated relative to said subject matter, and permitted it to remain uncontra-

dicted. If it be contended that the subject matter of this statement was disbelieved by the jury, then the testimony of both plaintiff's witness Kokonas and defendant's witness Dulgar confirmed the subject matter of said statement to the extent that he should have stayed on the running board while repairing the left hand board, and if he did, he would not have fallen off the top of the car. It is interesting to note that appellant on his rebuttal did not deny any of the testimony of either Kokonas or Dulgar, except that he was instructed never to use an acetylene torch on a loaded car.

Hence, we respectfully submit that the statement of February 9th constitutes an admission, the truth and correctness of which not only remains undenied, but stands confirmed by all of the other evidence on this subject.

In view of the uncontradicted testimony, it clearly supports the trial court's conclusion set forth in its memorandum opinion (R 18 to 20) where the court held that the plaintiff voluntarily adopted a method foolhardly under conditions *apparent to him* and carelessly neglected to follow a course which would readily appear to any one, even the unexperienced, to be safe. In other words, the court merely found, from all of the evidence, that which the appellant so clearly acknowledged in his statement of February 9th, when he said, "the only reason I got hurt was because I stepped off the wooden running board, * * * I just forgot myself, don't ask me why because I knew the top was wet with dew. I just forgot that's all. I could have stayed on the running board certainly. * * * I slipped off the metal, yeah, I wasn't on the running board. If I'd stayed on the running board I'd been alright because you don't slide on a running board."

The foregoing facts are analogous to the facts involved in *Detroit, T. & I. R. Co. v. Banning* (1949), C.C.A. 6th, 173 Fed.(2d) 752, Certiorari denied, 338 U.S. 815, 94 L. ed. 493. In that case, the appellant was a brakeman and a member of a switching crew which was making up a freight train. It had rained all day. The roadbed where he was working was covered with a thin layer of mud and the appellant got mud on his boots. In the course of his work he climbed on top of a moving car to a brake platform where it was his duty to operate the hand brake which controlled the speed of the box car. In so doing, he slipped from the car because of the mud upon his boots. The Court granted a directed verdict on the ground that the plaintiff did not establish that the defendant failed to furnish him with a safe place in which to work by directing and requiring him to work in the yard under muddy conditions so that his boots became slippery and covered with mud. As to whether the fact that plaintiff was required to work in the switching yards when the muddy conditions existed constituted negligence in failing to provide him with a safe place in which to work, the court on page 755 stated:

> "The fact that appellee got mud on his boots while working during or after a rain is not in our opinion any evidence of failure on the part of the carrier to furnish the appellee a safe place in which to work. *Nor does the evidence show in any way that appellee was required to work thereafter without being afforded an opportunity to counteract any danger resulting therefrom.* He had ample opportunity while waiting on the engine to clean his boots of mud." (Emphasis supplied)

In the case at bar, a direction to repair the left hand board of a running board on a cold and foggy morning did not constitute a direction or a requirement that he stand or work upon the icy metal roof, when a safe method of work was evident. Both plaintiff and his helper Kokonas knew that the running board itself was not slippery, and that one board could be removed while the workman stood upon the two remaining boards. Both of these men also recognized that the iron sloping roof was slippery. In the *Banning case,* the plaintiff elected to work with muddy boots when he could have cleaned them. In the case at bar, plaintiff voluntarily elected to stand upon the sloping metal roof with full knowledge of its slipperiness, and when he admittedly knew that his work could be done safely if he remained on the two running boards which were not slippery. Hence, the trial court correctly held that the slippery sloping metal roof was not a place of work where he was required to go to perform his said duties.

Therefore, the appellant has failed to prove his sole charge of negligence, that is, that the defendant negligently failed to provide plaintiff with a safe place to work by requiring him to perform his services at a time when there was "a sufficient amount of ice * * * so as to make the place wherein plaintiff was working unsafe."

IV.

NEGLIGENCE CANNOT BE PREMISED UPON THE PRESENCE OF FROST OR ICE UPON THE METAL TOP OF THE CAR UPON WHICH APPELLANT WAS WORKING.

It is an indisputable physical fact that during winter months in the City of Stockton, California, sloping metal roofs of freight cars become slippery, whether from mois-

ture deposited thereon by fog or rain or from frost or ice when such moisture freezes. The slipperiness of the metal roofs may vary depending upon whether the roofs are wet, frosty or frozen, but any of such types of weather condition would cause slipperiness and the dangers incident thereto. To avoid the slippery condition of the metal roofs caused by existing weather conditions, the railroad company has provided for the installation of running boards on top of the railroad cars, which extend for their entire length and are made of rough wood. If under any hypothesis it could be contended that the evidence supports a finding that the presence of such ice on the metal roof has rendered unsafe the place where plaintiff was required to perform his work, then any such hazard was solely caused by troublesome climatic conditions over which the appellee had no control.

Both before and after the 1939 amendment, the federal courts have continuously held that there is no liability under the Federal Employers' Liability Act for injuries caused by weather conditions; dangerous working conditions arising from temporary inclement weather do not constitute negligence on the part of the employer.

The leading case is *Missouri Pacific Railroad Company v. Aeby* (1928), 275 U.S. 426, 72 L. ed. 351. In this case the plaintiff (employee) slipped and fell on the icy platform at the defendant's station, while performing her services as station agent. During the night of the accident, it rained, froze and snowed. The steps of the station were covered with snow and ice and there was about three inches of snow on the platform. Going out at about 6:00 o'clock A.M. to perform her work, plaintiff stepped over the steps and platform but did not fall. When returning to the waiting room

she slipped on the ice and fell to her injury. Water which collected in a depression had frozen, and this was covered with snow. The Supreme Court of the United States in reversing a judgment for the plaintiff, held that the facts of the case when taken most favorably to plaintiff were not sufficient to sustain a finding that defendant failed in any duty owed to her. In the course of its opinion, the Supreme Court stated on pages 429-431 (U.S.):

> "* * * Its duty in respect of the platform did not make petitioner an insurer of respondent's safety; there was no guaranty that the place would be absolutely safe. The measure of duty in such cases is reasonable care having regard to the circumstances. *Patton v. Texas & P. R. Co.,* 179 U.S. 658, 664, 45 L.ed. 361, 364, 21 Sup. Ct. Rep. 275; *Washington & G. R. Co. v. McDade,* 135 U.S. 554, 570, 34 L.ed. 235, 241, 10 Sup. Ct. Rep. 1044; *Tuttle v. Detroit, G. H. & M. R. Co.,* 122 U.S. 189, 194, 30 L.ed. 1114, 1116, 7 Sup. Ct. Rep. 1166. The petitioner was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. *Baltimore & O. R. Co. v. Groeger,* 266 U.S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. No employment is free from danger. Fault or negligence on the part of petitioner may not be inferred from the mere fact that respondent fell and was hurt. She knew that it had rained and that the place was covered with ice and snow. *Her knowledge of the situation and of whatever danger existed was at least equal to that chargeable against the petitioner. Petitioner was not required to give her warning. National Biscuit Co. v. Nolan,* 70 C.C.A. 436, 138 Fed. 6, 12. It is a matter of common knowledge that almost everywhere there are to be found in public ways and on private grounds numerous places in general use by pedestrians,

that in similar weather are not materially unlike the place where respondent fell * * *" (Emphasis added)

"The facts of this case, when taken most favorably to the respondent, are not sufficient to sustain a finding that petitioner failed in any duty owed to her. *Nelson v. Southern R. Co.,* 246 U.S. 253, 62 L.ed. 699, 38 Sup. Ct. Rep. 223. As negligence on the part of the petitioner is essential, we need not consider its contentions in respect of assumption of risk and negligence on the part of the respondent."

The *Acby* case has been cited and approved several times after the 1939 amendment, and the principles therein announced have also been adopted after the amendment.

The first such case arising after the 1939 amendment is *McGivern v. Northern Pac. Ry. Co.* (1942), C.C.A. 8 Cir., 132 Fed.(2d) 213, which involved an action under the act for the death of a switchman, who received injuries while engaged in switching operations at the defendant's yard in Minnesota. It was snowing when the crew went on duty and there were five or six inches of wet, sticky snow covering the yard, and it continued to snow until approximately two hours prior to the accident. When the crew got the switch engine at the commencement of its shift, there was no snow on its footboard, but during the shift the freshly fallen snow was tracked onto the footboards by the members of the crew as they got on and off the engine. When last seen before the accident, decedent was standing near the outer edge of the footboard holding the switch list in his right hand and looking at it by the light of his lantern. He was found lying between the tracks and the marks on the snow indicated that he had been dragged. The defendant's motion for a directed verdict was denied and the trial court

submitted the case to the jury on three grounds of alleged negligence on the part of the defendant:

1. Failure to provide a reasonably safe place in which to work by allowing ridges and hummocks of ice to accumulate on the footboards;

2. Failure to furnish proper equipment and material to remove snow and ice from the footboards;

3. Failure to adopt any rule or custom and practice requiring removal of accumulation of snow and ice from the footboards.

In disposing of the first contended ground, to-wit, the failure to provide a reasonably safe place in which to work, the court on page 217 stated:

> "It is first urged that defendant was negligent in that it failed to furnish McGivern with a safe place in which to work. It is the duty of the employer to exercise reasonable care to the end that the employee be furnished with a reasonably safe place in which to work and reasonably safe tools and appliances. The employer is not, however, the insurer of the safety of his employee, and the test is whether reasonable or ordinary care has been exercised by the employer in that regard. *Baltimore & O. S. W. R. Co. v. Carroll,* 280 U.S. 491, 50 S. Ct. 182, 74 L.Ed. 566. The steps on this switch engine were, when the crew began to use them, free of snow. The accumulation of snow and ice during the progress of the work was a natural and normal consequence due to the recently fallen snow in the yards. There were no inherent imperfections in these steps rendering them less fit for the use for which they were intended. It cannot be said that the situation did not present dangers but danger in a particular phase of an employment does not necessarily imply negli-

gence. As said by the Supreme Court in *Missouri Pac. R. Co. v. Aeby,* supra (275 U.S. 426, 48 S. Ct. 179, 72 L. ed. 351), "no employment is free from danger." The defect to form the basis for a cause of action must be one which implies negligence on the part of the employer, or those for whose acts he is answerable. * * * Snow and ice are due to climatic conditions incident to railway employment in wintertime in northern Minnesota, and it has been held by the Supreme Court of Minnesota that a railway company is not liable to its employees for injuries resulting from climatic conditions such as snow and ice. * * * (Citing cases.) The duty of providing a reasonably safe place in which to work and reasonably safe appliance with which to work while a continuing one does not obligate the employer to keep the place of work safe at every moment where such safety may depend on the due performance of work by the servant and his fellow workmen. *Kreigh v. Westinghouse C., K. & Co.,* 214 U.S. 249, 29 S. Ct. 619, 53 L. Ed. 984. * * * *Under the prevailing conditions which were perfectly obvious snow on the footboards could not have been avoided."* (Emphasis supplied)

When the car in the case at bar was inspected on February the 7th, the day before the accident, there was no ice thereon (R 110). The weather was then above freezing (R 173), and continued to be thereafter until sometime between 6:27 and 7:28 A.M. of the 8th, when the thermometer dropped from 34° to 32°. The freezing temperature then continued through 8:28 A.M. (R 173). Since the accident happened at 7:10 A.M. on the 8th, the freezing weather either occurred shortly thereafter or shortly prior thereto and continued for over an hour after the accident. There-

fore, the situation was similar to that existing in the *McGivern* case, supra.

The next case chronologically, is the *Raudenbush v. Baltimore & O. R. Co.* (1947), C.C.A. Third Circuit, 160 Fed. (2d) 363. In that case, the plaintiff's intestate suffered fatal injuries while taking part in a shifting operation in defendant's yard, and action was brought to recover for his death under the Federal Employers' Liability Act. Decedent was serving as a brakeman of a yard crew and the crew had begun work at 10:30 in the evening, about an hour after a light snow had stopped falling. The instructions of the crew were to shove cars onto a certain track, couple them to cars already there and lay there and wait for a train. The cars which were to be coupled all had at least a light covering of snow. After the cars had been coupled and the train was standing motionless, decedent gave the engineer the slack signal for the purpose of enabling decedent to pull the coupling pin and cut the engine from the cars. This action seems to have originated with the deceased and was not covered by any instructions. The engine was cut and almost immediately thereafter the cars started to roll slowly to the east down a slight incline of the tracks. The conductor was walking towards the slowly moving engine. He saw a form go up and over, reach and grab for the gondola on its eastern end; he realized it was decedent. The next time he saw decedent, the latter's body was being rolled between the wheels of the gondola. An examination of the gondola showed a slip-mark or skid-mark on the brake sill, and it was inferred that decedent had run to the east end, had climbed upon it, had slipped while attempting to apply the brake of the gondola and had fallen between the cars.

The jury was charged with returning a verdict for the plaintiff if it found either of two sets of facts:

(1) that defendant was negligent in failing to remove the ice or snow from the gondola and that its presence was the proximate cause of the accident, or

(2) that the engine headlight should have been on when the cars started rolling. The jury returned a verdict in favor of plaintiff, but the trial court granted defendant's motion to set aside the verdict and judgment thereon and entered judgment for defendant. Plaintiff appealed.

One of the questions considered on appeal was whether the railroad was guilty of negligence in failing to remove any ice or snow which might have been upon the brake sill of the gondola. The court held that under the facts of the case, there was no negligence in this respect. In the course of its opinion, the court stated on page 366:

> *"It is a general rule of wide acceptation that since railroad companies have no control over the vagaries of the weather or climatic conditions that there is no liability for injuries resulting from the mere existence of ice or snow and disconnected from other circumstances.* It is true, however, that a railroad company, like other employers, must furnish its employees a reasonably safe place to work. The phrase 'reasonably safe place to work' is a term of relative application. It does not mean the absolute elimination of all dangers, but the elimination of those dangers which could be removed by the exercise of reasonable care on the part of the employer.
>
> The place of work here was a switch yard. It is a place of moving cars and locomotives and no reason exists why, within the confines of such yard, the employer should not be required to exercise a reasonable

degree of care to prevent an accumulation of snow or ice in such quantity and location as would constitute a menace to the safety of the employees in the performance of their various duties. The degree of care to be exercised by a party must have some reasonable relationship to the ability of that party upon whom the duty is cast to perform such duty. In this case we accept the statement of the learned judge that there were some 930 cars in the yard awaiting removal. The snowfall had ceased only an hour or hour and a half and had left a 'very, very thin coating.' While this case concerned the movements of only 14 cars, yet a somewhat similar duty would exist as to all other cars similarly situated.

* * * * * * *

We do not think that under the facts of this case, and particularly in view of the recentness of the storm and slight nature of the snowfall, *that any duty existed on the part of the railroad company to remove the light fall of snow from the area of the deceased's employment* and think no verdict could be based upon the violations of such supposed duty." (Emphasis supplied)

The last case chronologically is *Detroit, T. & I. R. Co. v. Banning* (1949), C.C.A. 6th, 173 Fed.(2d) 752. Plaintiff in this case was employed by defendant as a brakeman and at the time of the accident was working on a switchcrew which was making up a freight train. It had been raining all day. In performing a coupling operation, plaintiff walked around a roadbed which was covered by a thin layer of mud, getting this mud on his boots. At the time of the accident, plaintiff was on the brake platform and he contended that while making a flying switch he slipped off of the platform because his boots were slippery and covered with mud.

The trial court charged the jury in substance that plaintiff had charged defendant with negligence in two respects: First, that he was directed and required to work in the yard under muddy conditions so that his boots became slippery and covered with mud; and secondly, that defendant dropped the car upon which plaintiff was riding at such an excessive rate of speed that plaintiff could not bring it to a safe speed by means of the brakes provided. The jury returned a verdict for plaintiff and defendant's motions for judgment notwithstanding the verdict and for a new trial were overruled.

The Appellate Court reversed and remanded the case for a new trial, holding that the evidence was insufficient to go to the jury on the claim that *defendant was negligent in requiring plaintiff to work under muddy conditions.* Since the verdict was general, it was impossible to tell upon which claimed grounds of negligence the jury had based its verdict and therefore, the case had to be remanded for a new trial.

With reference to the claim of negligence relative to providing a safe place to work, the court stated that requiring employees to work under dangerous conditions resulting from temporary inclement weather was not negligence in and of itself, and in this regard, stated on page 755:

> "The evidence respecting whether the appellant was negligent in requiring Banning to work under muddy conditions resulting in muddy boots which caused him to slip and fall from the brake platform was not sufficient to take that issue to the jury. *Troublesome or severe climatic conditions are commonplace in the year-round operation of interstate carriers. A temporary dangerous working condition resulting therefrom is not by itself a negligent failure on the part of the carrier*

to provide the employee a safe place in which to work." (Emphasis supplied)

Thus, both prior and subsequent to the 1939 amendment to the Federal Employers' Liability act, the railroad is not liable for requiring its employees to work during temporary inclement weather and any dangerous working conditions resulting therefrom cannot, by itself, be the premise of liability.

In some of the cases hereinabove cited, it is indicated that in the event the snow fall or icy condition is very considerable and allowed to remain for an extended period of time, negligence may be premised not upon the inclement weather condition, but upon the employer's allowing the snow and ice to accumulate over an extended period of time. But the principle in these cases is that where the snow fall or icy condition is of slight nature or of recent occurrence, no negligence of the defendant can be premised thereon.

In the case at bar, the freezing weather was of recent occurrence, in that it commenced sometime between 6:28 and 7:28 A.M. The accident occurred at 7:10 A.M. and the freezing weather continued until 8:28 A.M. The only positive proof as to the quantity of ice comes from plaintiff's witness Kokonas and defendant's witness Dulgar, and both of said witnesses testified that the ice was the thickness of paper (or about 1/32nd of an inch). Further, the physical fact that the roof of the freight car slanted, compels the conclusion that the only water or moisture that could freeze on the roof was that which would not run off the slanting roof and which necessarily could be not more than moisture.

There is, therefore, no support for a charge of negligence based upon defendant's permitting the ice to accumulate

over any extended period of time. We are not concerned here as the court was in the *McGivern* case, supra, with any alleged negligence of the defendant in failing to furnish proper equipment to remove ice and snow from the rolling stock, because the complaint made no such charge nor was any attempt made to prove it.

V.

THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS APPELLANT'S VOLUNTARY ACT OF DOING HIS WORK IN A NEGLIGENT MANNER WHEN A SAFE METHOD WAS AVAILABLE.

Appellant concedes that before he stepped from the running board, a safe place, onto the metal roof, he knew that the metal roof was covered either with moisture (see Exhibit C), or with ice (R 71). Appellant was an experienced carman, with practically six years experience in the Stockton yards. Further, in his statement of February 9th, he admitted that he could have done this work by staying on the running board or as stated by him in such statement, "If I had stayed on the running board I'd been alright, because you don't slide on the running board." (See Exhibit C and appendix.) The situation at the moment of the accident in the case at bar was similar to that involved in the *McGivern* case, *supra,* where the court on page 218 stated the facts confronting McGivern:

> "It appears from the evidence that he rode the switch engine from the west end of the yards to the point where a string of cars were coupled onto a locomotive, a distance of about 1,600 feet. When the cars were reached the switch engine stopped. McGivern could then, had he thought it necessary or advisable, have

cleaned or sanded the footboard. However, he got back on the footboard and returned riding the engine to the west end of the yard. Having thus ridden the footboard for a distance of 1,600 feet he was in a position to know whether it required cleaning. If it did he should have cleaned it, or have the other members of his crew do so."

The appellant here likewise was fully apprised of the danger caused by the moisture or by the icy condition, and also he knew that it was not necessary for him to work upon the icy roof, and that the running board provided him a safe place to perform the repair. Does the voluntary abandonment of the known safe method and the adoption of an obviously dangerous method impose any liability upon the employer? In the *McGivern* case, the court held (at page 218) that:

"The defendant could not anticipate that McGivern would not exercise proper care for his own safety and we can only conclude in view of his knowledge and experience, that he did not believe the footboard required cleaning."

The court on page 219 further stated:

"As said by the Supreme Court in *Aerkfetz v. Humphreys,* 145 U.S. 418, 12 S. Ct. 835, 836, 36 L. Ed., 758: *'It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected.'* In *Chesapeake & O. Ry. Co. v. Nixon,* 271 U.S. 218, 46 S. Ct. 495, 496, 70 L. ed. 914, a section foreman while riding a motor car was overtaken by a train. The court, holding that he should have relied

upon his own watchfulness and kept out of the way of the train, said: *'The Railway Company was entitled to expect that self-protection from its employees.'* But it is said that conceding McGivern's negligence it was only contributory negligence and hence not a defense. There can, of course, be no contributory negligence, properly speaking, unless there is negligence on the part of the defendant. Here the negligence was that of McGivern alone. It was his failure to act that resulted in his injury and defendant cannot be held liable therefor." (Emphasis supplied)

The appellee in the case at bar, not only had the legal right to expect self-protection from its employees, but it further delegated to the carmen themselves (including the appellant), the duty of determining whether the repair work can be done with safety or not. If in appellant's judgment he could not do it safely, nor decide in his own mind how to do it safely, then he should consult his foreman (R 214). In the case at bar, appellant admittedly did not consult his foreman (R 61, 193).

Lasagna v. McCarthy, 177 Pac. 2nd 734 (Cert. den. 332 U.S. 829, 92 L. ed. 403) involved an experienced carman and inspector working in the switching yards of a navy depot, who did not elect to follow the employer's blue flag rule, but followed a "look out" method, that is, if one man went between or over the cars, the other man watched for approaching trains or cars. At the time of plaintiff's injury, both men went underneath the cars. In holding that the employee could not recover under the act, the court on page 740 stated:

"Even granting that the place was rendered unsafe by this violation of the 'blue flag' rule, *the respondent*

himself had a better opportunity than the appellants to know of the increased danger. He controlled the means by which the place could be made safe, and his own failure to properly perform his work was the only reason the place was rendered unsafe." (Emphasis supplied)

Here, the appellee could not be charged with negligence in failing to anticipate that appellant would disregard this safe method and adopt a dangerous method, when the icy condition prevailed, and particularly so when the foreman had never seen this safety practice disregarded (R. 209).

In *Eckenrode v. Pennsylvania R. Co.*, 164 Fed.(2d) 996; affirmed 335 U.S. 329, 93 L. ed. 41, the court held that for the employer to be held liable for negligence under the act in failing to take precautions, there must be some danger to which these precautions should be directed. The court held in that case that no such danger existed, for there was nothing in the decedent's conduct to give notice to the engineer of any possible dangers. On page 1,000, the court stated:

> "* * * It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained."

The only precaution that respondent could have taken in the case at bar would have been to send a guard to the roof of this car to stop or prevent appellant from "acting in a wholly unexpectable and unreasonable fashion," that is,

from stepping from the running board to the slippery metal roof.

Reference is also made to *Atlantic Coast Line R. Co. v. Dixon* (1951), C.C.A. 5th Circuit, 189 Fed.2nd 525, which was an appeal from a judgment recovered by plaintiff below, suing under the Federal Employers' Liability Act for personal injuries. The injuries resulted from an electric shock received by him when he mistakenly plugged the connection of a portable electric light cable into the outlet of a power circuit carrying a 440-volt current. He had intended to plug into a lighting circuit carrying only 110 volts, the outlet of which was located some 26 feet away. In reversing the judgment, the court on page 527 stated:

> "It is of course the duty of an employee to exercise reasonable and ordinary care for his own safety. If the employee's negligence was the sole proximate cause of his injury, he can not recover. * * * Temporary conditions produced by the employee negligently using or negligently failing to use, appliances provided by the employer, are not defects for which the employer is liable. *Wood v. Davis,* 5 Cir., 290 F. 1. *Nor is it actionable negligence that an employer fails to anticipate lack of care on the part of an employee. McGivern v. Northern Pac. Ry. Co.,* 8 Cir., 132 F.2d 213." (Emphasis supplied)

The principle in the *Dixon* case is applicable to the case at bar, in that appellant herein mistakenly or without thinking, stepped from the safe running board onto the icy metal roof when he well knew all dangers incident thereto, and also well knew that his work should have been done on the running board.

Appellant, in his brief, makes many unsupported statements, such as the following:

(a) That there is not one word of evidence in the record from any of the defendant's witnesses that the method used by the plaintiff was wrong or violating any rule of the defendant. (Appellant's brief, page 9.)

(b) That it was physically impossible for plaintiff to stand on the running board and at the same time, repair it. (Appellant's brief, page 10.)

(c) That there is positive evidence that appellant used all the careful methods necessary for his own safety in performing his work, and was injured by slipping on the icy surface of the car top because of the negligence of the defendant. (Appellant's brief, page 21.)

Plaintiff's witness Kokonas testified that if a man wasn't careful, he could slip on the ice upon the top of said car and further, that "a man can slip off a car even when it is wet and without ice" (R 90). He also testified that it was not necessary for one to stand on the metal portion of the roof in order to repair the specific running board in question but it could have been *and was repaired by him by standing on the remaining two boards of the longitudinal running board* (R 96). This was admitted by plaintiff in his statement of February 9th and was confirmed by witness Dulgar (R 195, 196). All of the evidence was in direct conflict with plaintiff's statement that it was physically impossible for him to stand on the running board and at the same time repair it (R 10). This is particularly true since the repair is merely the replacement of one of the three boards, so that the two remaining boards remained an ample and safe place in which to work. In light of the

physical facts concerning the dimensions of the running board, and the fact that the repair was performed without stepping off onto the roof, plaintiff's statement that it was impossible is inherently insufficient to support the verdict.

Lastly, the plaintiff is seeking to hold the appellee negligent in failing to anticipate that an experienced repairman would stand upon the ice encrusted car top. Appellant had the same knowledge that he is trying to impute to the defendant, and had obvious means of avoiding all hazards therefrom by doing his work from the running board. Appellant has overlooked the proposition that if the work, as here, is simple in character and free from complications and complexities, the employer is under no obligation to adopt any rule with reference thereto. *McGivern v. Northern Pac. Ry. Co.,* 132 Fed.(2d) 213 at 219. Nor is there any duty to give notice to the employee of simple dangers, such as the likelihood of slipping on the ice encrusted metal roof of a box car. *Missouri Pacific Railroad Company v. Aeby,* supra. Therefore, it is apparent that the only possible conclusion from the undisputed evidence is, as the appellant himself characterized it in his statement, that he forgot himself and made a mistake. No negligence on defendant's part can be premised on this mistake of appellant, nor in failing to anticipate the negligent conduct of an experienced employee.

VI.

NO NEGLIGENCE CAN BE PREMISED UPON THE FAILURE TO APPLY SALT AND/OR SAND TO THE ROOF.

At the trial appellant contended, and as we read his brief on appeal he still contends, that Dulgar, his immediate superior, "should have adopted some safe method to make

the icy metal roof a safe place to work on and a safe procedure would have been to put sand and/or salt on the icy metal roof." Since the metal part of the roof was not a place of work, as demonstrated above in this brief, there was no obligation to remove the ice or moisture from the latter in order to provide a reasonably safe place in which to work.

Even if we concede for the purpose of argument that it was necessary to stand on the icy metal roof to perform the work then the question arises whether or not any negligence could be premised upon the fact that sand and salt was not placed upon said thin coating of ice. On page 6 of Appellant's brief, it was stated that Wayne E. Wise was General Chairman of the Joint Board of the defendant corporation railroad, and it is inferred that he was an employee of defendant. Such is incorrect. Wise is a general chairman of the Brotherhood of Railroad Carmen of America (R 121). Mr. Wise had had no experience in performance of the work in question except what he gained as an apprentice for Western Pacific prior to 1931. Thereafter he worked for the Pacific Fruit Express Company as a car builder (R 124). Then he started in 1936 as a steel carman in the defendant's shop in Sacramento (R 124) and in October 1942, he became local chairman of the Brotherhood (R 125). We do not believe that he was qualified as an expert, and further believe that his testimony hereinafter mentioned does not inferentially or otherwise prove any negligence on behalf of the defendant in the instant case.

Mr. Wise was asked whether he made studies in the problems presented where cars had icy roofs, to which he replied "Yes" (R 129), and he further testified that "we found that

icy conditions are best overcome by the use of salt or sand sprinkled on the roofs of icy cars." (R 131) The only place he mentioned at which they practiced this was Omaha, Nebraska (R 135).

Plaintiff also called one Raymond McElroy, who testified that he has sprinkled salt and sand on ice accumulated on top of freight cars, but his experience is limited to the Baltimore & Ohio shops in South Chicago in 1930 and 1932 and the Chicago & Great Western in Iowa in 1924 or 1925 (R 269, 270). He admitted that the South Chicago area was extremely cold and he has "seen it 20° below" (R 271). His testimony related to areas where they have considerable ice, or as he stated, "Anywhere from 6 feet to a quarter of an inch" (R 272). It is to be noted that witness McElroy's experience went back to 1924, and that in 28 years he only was able to recall two areas where salt and sand were used (R 274). Neither of these instances occurred within the past twenty years and neither referred to a California or western area.

Defendant called Herbert G. Brown, who was a mechanical foreman in Stockton, California, for the Santa Fe railroad. He had been in the employ of said company for 42 years and had served on every point on the line west of La Junta, Colorado. He had never seen sand or salt used on roofs with ice or snow thereon (R 215), and he considered it an unsafe practice because any loose substance on top of a roof is unsafe to men working around or on it. Further, he knows of no instance where the employees' union representatives have ever suggested such a practice (R 215).

Clarence L. Doane was likewise called as a witness by defendant. He is the car foreman for the Western Pacific Company at Stockton yards, and has worked at the Stockton and Oakland yards and also at the yards at Winnemucca, Nevada. He likewise has never seen sand or salt used on the top of cars where there is ice or snow thereon (R 227). He likewise did not consider the use of sand or salt a safe practice because salt or sand would roll under the feet of a man walking on it, and cause a greater hazard unless it is frozen into the ice. Further, when the car moved, such salt and sand would blow off, causing injury to the trainmen on or about such cars (R 227).

Defendant's witness William Dulgar testified that to his knowledge the Southern Pacific Company has never used salt or sand (R 196) for the reason that it was not a safe practice, and "we do not have conditions that would require it" (R 196). He testified that it was unsafe because when the car started moving out again, the trainmen have their heads out the windows of the cabs to make inspections, and the sand would fly back and get in their eyes. Further, the use of salt or sand would cause a hazard just the same as icy conditions by rolling under the feet (R 197).

We believe that the mere fact that Wise, through privately conducted "studies," reached the conclusion that salt and sand was a way by which slipping on icy roofs could be prevented does not constitute substantive evidence of negligence sufficient to support the jury verdict. This is particularly so when there was no evidence that such studies were called to the attention of the supervisors of the railroad and the division thereof where the appellant was working. Nor does the testimony as to practices in the sub-

zero weather of the midwest some twenty-five odd years ago constitute any substantive proof of negligence. Further, appellee called the representatives of two of the other major railroads operating in California, and they testified, harmonious with Mr. Dulgar, to the effect that neither of them had ever heard of using sand or salt on roofs of cars to prevent slipping and all deemed it to be an unsafe practice. The fact that the practice is not followed by railroads in northern California seems to be decisive evidence that negligence can not be premised upon failure to follow such proposed practices. This was discussed by the court in *McGivern v. Northern Pac. Ry. Co.*, supra, page 218:

> "These instrumentalities were in general use and met with general approval for the performance of this work. *Two other carriers doing switching in Minnesota were shown to follow exactly the same practice.* While custom or usage may not be controlling as fixing the standard of care, it may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee. *The decision of the managing officers of doubtful questions relating to methods of operation or equipment are deemed to be presumptively right and ordinarily they may not be made the foundation of liability to the employee.* (Emphasis supplied)

Appellant's entire argument on this score is based upon the premise that the place from which he fell was a place of work. If it was not a place of work, there was no necessity of providing any ways or means of combating the icy condition. As demonstrated above, the icy metal roof was not a place of work at all. A safe place of work was provided for plaintiff, namely, the two remaining rough boards of the

running board, and plaintiff voluntarily elected to leave this safe place and to abandon this safe method of doing his work, and instead voluntarily selected a dangerous place and performed his work by a dangerous method. Defendant was not bound to anticipate the remote possibility that plaintiff would attempt to repair the running board by standing on the obviously icy metal portion of the roof, and then to make the roof safe by sprinkling salt or sand upon it. (*Brady v. So. R. Co.*, 320 U.S. 476, 483; 88 L. ed. 239, 245.)

VII.

CONCLUSION

It is respectfully submitted that the judgment entered below was correct, in that "it appears conclusively * * * that a reasonably safe place and method of doing the work was afforded and the plaintiff's injuries resulted from his own deliberate or careless act, not from any actionable fault of defendant." The Federal Courts recently have recognized as did the court below, that the social adequacy or inadequacy of the provision of the Federal Employers' Liability Act is a concern of Congress, not the courts. Congress has made negligence of the employer the sole basis for compensation in cases such as this. In the absence of negligence proximately causing the injury there can be no recovery.

It is respectfully submitted that the judgment be affirmed.

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(Appendix follows)